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8	UNITED STATES BANKRUPTCY COURT
9	FOR THE DISTRICT OF OREGON
10	In Re:  ) Bankruptcy Case ) No. 07-62339-fra11
11	LEWIS EDWARD GRAHAM, II,
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14	Grand Pacific Financing Corp. ("GPFC") filed a motion under §
15	$362(j)^1$ seeking an order confirming that the automatic stay of § $362(a)$
16	has been terminated. At issue is the effect of an order terminating the
17	automatic stay under § 362(c)(3)(A), which provision was added as part of
18	the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").
19	GPFC and the Debtor filed memoranda arguing their respective positions. A
20	hearing was held on October 7, 2008, at the conclusion of which, the
21	matter was taken under advisement.
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26	$^1$ Unless otherwise indicated, all section references are to the Bankruptcy Code at 11 U.S.C. $\S101$ et $seq$ .
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Debtor filed a chapter 13 bankruptcy case on July 9, 2007 (07-61896-fra13). A creditor filed a motion to dismiss the case on the grounds that Debtor did not qualify for chapter 13 relief pursuant to § 109(e) and that the case was not filed in good faith. Debtor thereafter moved to dismiss and an order of dismissal was entered on July 25, 2007. Debtor filed a second bankruptcy case on August 19, 2007, under chapter 11.

BACKGROUND

GPFC has filed two proofs of claim in this case: Claim #17 (amended) in the amount of \$4,095,524, secured by various real and personal property of the Debtor, and Claim #18 (amended) in the amount of \$1,588,872, also secured by real and personal property of the Debtor. The claims are based on personal guarantees made by the Debtor for loans made by GPFC. When Debtor filed bankruptcy, the Debtor's property securing GPFC's loans became property of Debtor's bankruptcy estate.

Because the Debtor's present case was filed within one year of a previous case which was pending during that period but dismissed, extension of the automatic stay beyond a 30-day cutoff date imposed by the Bankruptcy Code required the filing of a motion by a party in interest. § 362(c)(3)(B). Debtor did so on September 5, 2007. At a hearing on September 13, 2007, the Court issued findings from the bench denying Debtor's motion to extend the automatic stay. GPFC has now filed a "Motion for Order Confirming Automatic Stay is Not in Effect" pursuant to § 362(j), seeking a determination that the automatic stay was terminated with respect to property of the Debtor as well property of the bankruptcy estate.

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## DISCUSSION

Section 362(c)(3) provides in relevant part:

- (3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--
- (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
- (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; [Emphasis added].

## Actions Subject to Stay Termination

As mentioned previously, the Court declined to extend the automatic stay after notice and a hearing held on September 17, 2007. GPFC urges the Court to adopt the minority position regarding the extent of the stay termination, and rule that § 362(c)(3)(A) terminated the stay in its entirety. See e.g. In re Curry, 362 B.R. 394, 400-02 (Bankr. N.D.Ill. 2007), In re Jupiter, 344 B.R. 754, 759 (Bankr. D.S.C. 2006). These courts have ruled that the language of § 362(c)(3)(A) is ambiguous, i.e. is capable of more than one interpretation, that legislative history indicates that Congress intended the automatic stay to terminate in its entirety, and that interpreting the statute in this manner is consistent with other provisions added by BAPCPA and with the broader context of the

statute as a whole. These courts find that the phrase "with respect to the debtor," defines not the property for which stay protection is terminated, but which debtor is affected by stay termination. The example given is a joint bankruptcy case where only one of the co-debtors had a case dismissed within the previous year. See In re Jupiter at 759-60. The automatic stay would remain in place respecting the other co-debtor.

Debtor, on the other hand, urges the Court to adopt the position of the majority of courts confronted with this issue which holds that there is no ambiguity in the statute, and that § 362(c)(3)(A) terminates the stay with respect to the debtor and property of the debtor, but not property of the estate. See e.g. In re Jumpp, 356 B.R. 789 (BAP 1st Cir. 2006), In re Holcomb, 380 B.R. 813 (BAP 10th Cir. 2008). As indicated in Holcomb, these courts reason that if Congress meant to terminate the stay in its entirety, it could have done so in plain language, as it did in §  $362(c)(4)(A)(i)^2$ .

I find that the better approach is the one taken by the majority of courts that have ruled on this issue, and hold that § 362(c)(3)(A) terminates the automatic stay with respect to the debtor and property of the debtor, but leaves the stay in place respecting property of the estate. In making this holding, I adopt the rationale of the Panel in

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<sup>&</sup>lt;sup>2</sup>This section reads: "if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed . . ., the stay under subsection (a) shall not go into effect upon the filing of the later case." This language clearly refers to the automatic stay in its entirety. *In re Nelson*, 391 B.R. 437, 449 (9th Cir. BAP 2008).

Holcomb in finding that there is no ambiguity in the language of the statute and that reading the statute in accordance with its plain meaning is consistent with the policies of the Bankruptcy Code. Holcomb at 816.

## "With Respect to Any Action Taken"

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Section 362(c)(3)(A) terminates the stay at the end of the 30-day period "with respect to any action taken" regarding a debt or property securing such debt or regarding a lease. In In re Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006), the court compared the term "act" found in sections 362(a)(3), (a)(4), (a)(5), and (a)(6) with the term "action" found in § 362(a)(1), in various subsections of § 362(b) and at § 362(c)(3)(C)(ii). From that comparison, it determined that the term "action," as used in § 362(c)(3)(A) refers to a "formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding." Moreover, because the section refers to "action taken," it follows that the action referred to must have occurred pre-petition. Id. at 280. That the action must have been taken pre-petition also follows from the fact that an action taken postpetition (i.e. during the 30 days after the petition date when the automatic stay is in effect) would be void ab initio. In re Schwartz, 954 F.2d 569 (9th Cir. 1992). The Paschal court concluded that § 362(c)(3)(A) terminates the automatic stay only with regard to an action taken by a party prior to the petition date. Paschal at 280-81. holding in Paschal is well reasoned and is hereby adopted by this Court. // // // // // //

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## CONCLUSION

Section 362(c)(3)(A) terminates the automatic stay with regard to any action pending on the petition date to the extent the action is limited to the debtor or property of the debtor. As GPFC did not have any action pending at the time the present case was commenced, it cannot proceed to enforce its lien rights without leave under § 362(d). The Court will enter an order consistent with this Memorandum Opinion.

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FRANK R. ALLEY, III Bankruptcy Judge

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